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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 991

EDWARD S. CANNON and CHARLES SMITH,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

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Comes now the above named petitioners, Edward S. Cannon and Charles Smith, and present this, their petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

The Circuit Court of Appeals for the Fifth Circuit, has decided two questions of general importance, and in conflict with other Circuit Courts of Appeals and District Courts. The lower court holds herein that an officer can forcibly stop and search a car on a public highway, solely upon hearsay information, and in a proceeding to suppress the evidence heard before trial, the officer cannot be compelled to divulge the source of such information. In so hold-

ing, the lower court is in conflict with what this Court has indicated as required to establish probable cause, that is "circumstances known to the seizing officer," *Carroll v. United States, 276 U. S. 132*, and in conflict with the following Circuit Courts of Appeals:

The Fourth Circuit, in *Elrod v. Moss, 278 F. 123*, said:

> "Under the federal as well as state statutes, to justify search and seizure or arrest without warrant, the officer must have direct personal knowledge, through his hearing, sight, or other sense, of the commission of the crime by the accused."

The Seventh Circuit, in *Lawson v. United States, 9 F. (2d) 746*, said:

> "* * probable cause must be determined by the existence of facts known to the officer before, * * *" (p. 746)

The Circuit Court of Appeals for the Sixth Circuit, in *Wisniewski v. United States, 47 F. (2d) 825*, therein recognized that information received "may have amounted to no more than ground for suspicion * * *". But therein held that the circumstances within the personal knowledge of the officers confirmed the information, and sustained the search, citing *Husty v. United States, supra*, wherein this Court sustained the search because the circumstances known to the officers, confirmed the information before the search.

In *United States v. Li Fat Tong, 2nd Cir., 152 F. (2d) 650*, and *King v. United States, 9th Cir., 1 F. (2d) 931*, cited by the lower court herein, do not sustain the holding

that probable cause to authorize search without warrant can exist upon hearsay information alone. In both those cases, the circumstances known to the seizing officers before the search, confirmed the information, and the courts therefore sustained the searches. The lower court is therefore alone in holding that:

> "We are also in no doubt that the testimony of the officers, that they had information which they believed was reliable, was sufficient *in itself* to justify the search." (Emphasis ours) 158 F. (2d) 952, 954.

The lower court has ruled herein as the law of the Fifth Circuit, in conflict with other circuits, that hearsay information is, of itself, sufficient to authorize a forceful search of an automobile on a public highway, and has further ruled that the seizing officer who testifies against the accused, cannot be compelled to divulge the source of his alleged information. Does not such ruling destroy the purpose and effect of the Fourth Amendment, by granting to officers an unlimited and arbitrary power to make searches and seizures in disregard to Constitutional limitations, in order to obtain the arrest of a violator of the Federal laws? Then too, is not a refusal to permit the accused in a proceeding to suppress evidence, a proceeding ancillary to the criminal prosecution, the right to cross-examine the arresting officer as to the source of his alleged information, in order that the court may have the benefit of same in determining whether probable cause existed for the search, and to afford the accused opportunity of testing the veracity of the officer, and whether he was justified in relying on such information if so received by him, a violation of the accused right to due process of law under the Sixth Amendment?

The decision of the Fifth Circuit herein holding such information may be withheld, is in conflict with the Second and Third Circuit Courts of Appeals, and certain United States District Courts, and also does not such ruling deprive the accused of due process of law as provided by the Sixth Amendment?

In *United States v. Heitner, 2nd Cir., 149 F. (2d) 105*, the court therein said as to compelling disclosure of source of information in making an arrest, said:

> "It is true that, when they act upon information, it is proper to compel them to disclose its source—subject to some limitations—since otherwise there is no way to test whether they have had 'reasonable cause' for the arrest. * *" (pp. 106, 107)

The United States Circuit Court of Appeals for the Third Circuit, in *Wilson v. United States, 59 F. (2d) 390*, held contrary to the Fifth Circuit herein, that where a search is dependent upon information received, the source of such information must be revealed. The court therein held that while public policy forbids disclosure of confidential information, there is an exception to such rule where what is asked is essential to the proper disposition of the case, and with respect thereto, said:

> "The question here at issue was whether the evidence secured by a search and seizure should be suppressed. The proceeding was ancillary to a criminal prosecution against the Delaware league. The witness had testified that he had procured access to the rooms of the league on the invitation of a member, who had supplied him with a membership card, a key, and a plan of the building. If these means of access had not been sup-

plied by a member, but had been unlawfully obtained, the evidence secured should be suppressed. Fraternal Order of Eagles v. United States (C. C. A.) 57 F. (2d) 93. To determine this, the information sought could not be withheld. The evidence was 'essential to the proper disposition of the case,' and, in consequence, admissible, and, being admissible, the witness could not withhold it. Upon his refusal to testify he was properly adjudged to be in contempt, and an order of commitment properly followed." (p. 392).

In *United States v. Keown, 19 F. Supp. 639*, the court held that confidential information could be used in detecting facts and circumstances which may give rise to grounds for a search without warrant, and if so, the source of such information is immaterial and need not be divulged. But that the government cannot place a witness on the stand whose testimony is based on an informer, and deprive the accused the right to cross-examination as to the source of such information. The court therein held to do so, is a deprivation of due process of law under the Sixth Amendment. See also State v. Bigham, 133 S. C. 491, 131 S. E. 903. In the *Keown* case the court referred to the conflict between courts on the subject, and because of the importance thereof, emphasized the necessity of a uniform ruling.

In *Segurola v. United States, 1st Cir., 16 F. (2d) 563*, the court sustained the ruling of the lower court that to divulge confidential information as to its source, is against public policy, but, the court sustained the search, not, as in the instant case, on hearsay information alone, but because as the court therein said:

"On this record there was, therefore, apart from any confidential communication, abundant evi-

> dence of probable cause for the seizure under the principles in the Carroll Case, supra."

Certiorari was granted 275 U. S. 106, but this Court avoided decision on the question as to the confidential nature of the testimony for the reason that proper objection and exceptions had not been taken in the lower court, and further, that the motion to suppress came too late. And in *Husty v. United States, 282 U. S. 694*, the arresting officer was asked the name of his informer, but refused to answer, and was not required to do so by the lower court, and this Court refused to rule on the competency of the question, and on this subject said: "In the course of the hearing on the motion, questions by petitioners seeking to establish the name and identity of the officer's informant were excluded. Petitioners ask review of these rulings on the evidence, but we do not consider them, since they were not assigned as error on the appeal to the Circuit Court of Appeals (48 F. (2d) 1076), and it does not appear that they were presented or passed upon there. *Guigan v. United States, 274 U. S. 195, 200, 47 S. Ct. 566 (568).*"

In *Scher v. United States 305 U. S. 251*, counsel for defendant undertook to question the arresting officers relative to the source of the information which led them to observe the defendants' actions. Objections to these questions were sustained, and such was assigned as error to this Court. As to this, this Court said:

> "In the circumstances the source of the information which caused him to be observed was unimportant to petitioner's defense. The legality of the officers' action does not depend upon the credibility of something told but upon what they saw and heard—what took place in their presence.

Justification is not sought because of honest belief based upon credible information as in United States v. Blich (D. C.) 45 F. (2d) 627."

In the above case this Court considered that the source of the information was unimportant to petitioner's defense, as the validity of the search "did not depend upon the credibility of something told but upon what they saw and heard—what took place in their presence." But, in the instant case, as in *United States v. Blich (D. C.) 45 F. (2d) 627*, cited by this Court in the above opinion, the validity of the search did, upon the ruling of the court, depend upon the credibility of something allegedly told the officers. In the instant case the officer testified that the cause of the search was:

"Q. What was the cause of it?

"A. We had information the he was to —.

"Q. What information did you have?

"A. That he was to have contraband in his car." (R. 25)

Nothing took place in the presence of the officers to justify the search. And while the lower court held that in addition to the information there were circumstances which made the search reasonable, citing *Scher v. United States, supra*, such is not sustained by the evidence. In the *Scher* case the officers saw and heard sufficient to justify them in believing the credibility of their information, and, in addition thereto, before the search was made, the driver of the car admitted possession of whiskey in his car, and consequently the source of the officer's information, as stated by this Court was immaterial. But, in the instant case,

nothing was observed by the officers to warrant them, as prudent men in believing petitioners were in the act of transporting marihuana, they merely acted on information. This is not disputed in the evidence. The officer admitted that when they saw petitioners' car pass them on the highway, it was their intention to stop it, and search it. (R. 32). They neither saw nor heard anything to confirm the alleged information. As to this, in the brief in opposition to the petition herein, no attempt is made to sustain the search without the alleged information. As to this, we quote from the brief as follows:

> "While the acts of petitioners as observed by the agents might not alone have been sufficiently suspicious to constitute probable cause for a search, such acts did tend to confirm the information received from the informer and, considered together with such information, were such as to lead a reasonable man to believe that petitioners were transporting marihuana." (p. 7)

And counsel for the government urge that this Court in the *Scher* case did "indicate that the actions observed by the officers might not in themselves have been suspicious without the light thrown on such actions by the confidential information theretofore received." (p. 7) But this Court therein specifically held that the actions observed by the officers, and what they heard, were alone sufficient to justify the search. The *Scher* case is, in no respect, parallel to the instant case.

That the search in the instant case is sustained by the lower court solely upon the alleged information received by the officers, is made clear by the ruling of the lower court in the case of *Medina v. United States, 158 F. (2d) 955,*

submitted the same date, wherein the court, in a *per curiam* decision, citing their opinion in the instant case, said:

> "The evidence in each of the cases establishes without contradiction that the search and seizure was made on information believed by the customs officers, who made the search and seizure, to be reliable. It is settled law that such information will support a finding that a search of an automobile based upon it was not unreasonable."

In *United States v. Blich (D. C.) 45 F. (2d) 627*, the court held that an agent making a search of an automobile without a warrant, on information, must reveal the source of the information, to sustain his motives, and cannot be "safely ensconced, behind his blanket testimony that he was informed by a reliable person."

And, we submit, for the court to hear the testimony of the arresting officer that he made the forceful search without a warrant, and upon alleged information received, and to consider such information as probable cause for the search, and to refuse the accused the right to cross-examine the officer as to the source of the alleged information, is a deprivation of the right of accused under the Sixth Amendment. *State v. Bigham, 133 S. C. 491, 131 S. E. 603*; *United States v. Keown, supra.*

It is respectfully submitted that the two questions above presented are each of such importance to the enforcement of federal laws, that calls for a review thereof by this Court for a uniform ruling thereon.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that a Writ of

Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court of Appeals had in the case number and style on its docket, "*Edward S. Cannon and Charles Smith, appellants, vs. United States of America, appellee, Number 11,675*", to the end that this cause may be reviewed and determined by this Court as provided for by the Constitution of the United States and the judgment herein of said United States Circuit Court of Appeals be reversed by the Court, and for such other relief as to this Court may seem proper.

M. A. GRACE,
EDWIN H. GRACE,
Attorneys for Petitioners.

CERTIFICATE OF COUNSEL

I, M. A. Grace, counsel for the above-named petitioners, do certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Counsel for Petitioners.

I, M. A. Grace, do certify that copy of the foregoing petition was mailed, postage prepaid, to Honorable George T. Washington, Acting Solicitor General, Washington, D. C.

Counsel for Petitioners.